

Hon. Robert J. Bryan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

SCOTT R. PAULSON,

Plaintiff,

vs.

PRINCIPAL LIFE INSURANCE COMPANY,

Defendant.

Case No. 3:16-cv-05268-RJB

**DEFENDANT PRINCIPAL LIFE
INSURANCE COMPANY'S REPLY TO
PLAINTIFF'S MOTION FOR
JUDGMENT ON THE
ADMINISTRATIVE RECORD
PURSUANT TO RULE 52 OF THE
FEDERAL RULES OF CIVIL
PROCEDURE**

TRIAL DATE: August 8, 2017 at 9:30 am

I. INTRODUCTION

Plaintiff's entire claim is based on the utterly disingenuous argument that he lacks the *ability* to work in *any Gainful occupation*. This is simply not true. The record demonstrates that Plaintiff is certainly able to work Gainfully and there are several Gainful Occupations for which he either *currently is* or *could reasonably become* qualified based on his training, education, and experience. Plaintiff would have this Court disregard the fact that he has held a license to sell real estate properties since June 24, 2010 (just over seven years), and has been gaining training and experience in that field ever since. He is, in fact, working Gainfully in his

1 chosen occupation of Real Estate Broker and sold in excess of \$5.0 Million in properties in the
 2 last 12 months alone. Likewise, Plaintiff would have the court ignore his twenty years of
 3 experience in the transportation and trucking industry prior to the onset of his disability.

4 For the reasons set out in Principal Life's opening brief and its responsive brief, which
 5 are fully incorporated herein, Principal Life's decision to terminate Plaintiff's long-term
 6 disability benefits should be upheld because the record before this Court unequivocally shows
 7 that there are Gainful Occupations within Plaintiff's physical restrictions and that Plaintiff is
 8 qualified for and/or can become qualified for based on his education, training, and experience.
 9 Thus, Plaintiff simply cannot meet the Group Policy's definition of Disability for the Any
 10 Occupation period in question and judgment should be entered in favor of Principal Life under
 11 either standard of review.

12 **II. PRINCIPAL LIFE'S DECISION SHOULD STAND UNDER EITHER** **STANDARD OF REVIEW**

13 **A. The Group Policy Mandates an Arbitrary and Capricious Standard of Review.**

14 On the basis of *Flaen v. Principal Life Ins. Co.*, No. C15-5899BHS, 2016 U.S. Dist.
 15 LEXIS 177638 (W.D. Wash. Dec. 22, 2016), which is not binding on this Court, Plaintiff
 16 challenges Principal Life's position that an arbitrary and capricious standard of review is
 17 applicable to this Court's review, contrary to the clear Group Policy language. Plaintiff
 18 concedes in his brief that the Group Policy, which was issued and delivered in Texas and has a
 19 choice of law provision, contains an express discretionary clause, conveying discretionary
 20 authority upon Principal Life to determine benefit eligibility and interpret the terms of the
 21 Group Policy, but argues that given Washington State's ban of discretionary clauses, a *de novo*
 22 standard of review applies to this matter.

1 Nonetheless, his brief argues that Principal Life's determination was *arbitrary and*
 2 *capricious* rather than focusing on satisfying his burden of proving entitlement to benefits by a
 3 preponderance of evidence based on the administrative record as necessary to prevail under the
 4 *de novo* standard of review he would have the court apply. Just as with his argument that he
 5 should still be entitled to long-term disability benefits even while he is working Gainfully as a
 6 Real Estate Broker, Plaintiff attempts to "have his cake and eat it too" with regard to the
 7 standard of review.

8 It is clear on its face that the Group Policy was issued and delivered and paid for in
 9 Texas and is subject to Texas law by its own provisions. (AR 5, 72, 119-123). It has been
 10 settled law in the Ninth Circuit that in determining the applicable standard of review, a choice
 11 of law provision in an ERISA plan should be followed unless unreasonable or fundamentally
 12 unfair. *See Fenberg v. Cowden Auto. Long Term Disability Plan*, Nos. 05-17192, 06-15132,
 13 259 Fed. Appx. 958, 2007 U.S. App. LEXIS 29438, *1 (9th Cir. Dec. 17, 2007); *Gonda v. The*
 14 *Permanente Medical Group, Inc.*, No. 11-cv-01363-SC, 2015 U.S. Dist. LEXIS 18892 (N.D.
 15 Cal. Feb. 17, 2015) (acknowledging that *Fenberg* had broadened the application of *Wang [Lab*
 16 *v. Kagan*, 990 F.2d 1126 (9th Cir. 1993)] to determinations of the applicable standard of
 17 review in ERISA benefits cases, *id.* at *21, FN. 2); *Doe v. PriceWaterHouseCoopers Health &*
 18 *Welfare Plan*, No. C 13-02710 JSW, 2014 U.S. Dist. LEXIS 81071 (N.D. Cal. June 11, 2014)
 (upholding choice of law provision in ERISA plan.).

19 The Group Policy on which Plaintiff relies for his entitlement to benefits contains such
 20 a choice of law provision, stating that the Group Policy is governed by and subject to Texas
 21 law. (AR 72). The Group Policy was applied for by, negotiated with and issued to McLane, a
 22 Texas company, in Texas. (AR 119-123) It was delivered in Texas and billed in Texas and the

1 premiums were paid from Texas. (Id.) Applying the laws of the State of Texas to the Group
 2 Policy is neither unreasonable nor fundamentally unfair, but instead is required by settled
 3 Ninth Circuit law and principles of uniformity, predictability and fairness inherent to ERISA.
 4 An arbitrary and capricious standard of review should guide this Court's review of Principal
 5 Life's determination.

6 Irrespective of the choice of law provision contained in the group contract, however, it
 7 is also settled insurance law that the law of the state of issuance of an insurance contract
 8 governs any disputes under the contract. *See Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *John*
 9 *Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), where the Supreme Court found
 10 non-significant forum contact when the insurance policies to be interpreted had been issued
 11 and delivered in a state/country other than the forum state. Principal Life respectfully submits
 12 that this Court should review the termination of Plaintiff's claim under an arbitrary and
 13 capricious standard of review. *See also* ([DE# 26] Plaintiff's brief at p. 6.) As its
 14 determination is supported by substantial evidence as set out in full detail in its previous briefs,
 15 Principal Life should prevail.

16 **B. Principal Life's Determination Was Not An Abuse Of Discretion And Should
 17 Be Upheld Under The Arbitrary And Capricious Standard Of Review.**

18 "The Supreme Court has held that a denial of benefits 'is to be reviewed under a *de*
 19 *novo* standard unless the benefit plan gives the administrator [. . .] discretionary authority to
 20 determine eligibility for benefits or to construe the terms of the plan.'" *Burke v. Pitney Bowes*
 21 *Inc. Long-Term Disability Plan*, 544 F.3d 1016, 1023 (9th Cir. 2008) (quoting *Firestone Tire*
 22 *& Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Where the plan "does grant such
 discretionary authority, we review the administrator's decision for abuse of discretion." *Saffon*

1 v. *Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 866 (9th Cir. 2008).

2 There can be no question that the discretionary clauses unambiguously vest Principal
 3 Life with the discretion to determine benefit eligibility and to construe the terms of the group
 4 insurance issued. The Ninth Circuit has held that in the ERISA context, “the test for abuse of
 5 discretion in a factual determination...is whether [the Court] is ‘left with a definite and firm
 6 conviction that a mistake has been committed,’ and [the Court] may not merely substitute [its]
 7 view for that of the fact finder.” *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666,
 8 2011 U.S. App. LEXIS 4386 (9th Cir. 2011) (citing *United States v. Hinkson*, 585 F.3d 1247
 9 (9th Cir. 2009) (en banc).) “To do so, [the Court] consider[s] whether application of a correct
 10 legal standard was “(1) illogical, (2) implausible, or (3) without support in inferences that may
 11 be drawn from the facts in the record.” *Id.* Here, there is nothing in the record evidence to
 12 suggest that Principal Life’s determination was “illogical, implausible or without support” nor
 13 is there anything that could leave the court with the “firm conviction that a mistake has been
 14 made.” *Id.*

15 Even when a claims administrator’s decision is contrary to some evidence in the
 16 administrative record, it does not mean that the denial of benefits was an abuse of discretion. *Taft*
 17 v. *Equitable Life Assur. Soc.*, 9 F.3d 1469, 1473 (9th Cir. 1993). However, “[a]pplying a
 18 deferential standard of review does not mean that the plan administrator will prevail on the merits.
 19 It means only that the plan administrator’s interpretation of the plan “‘will not be disturbed if
 20 reasonable.’” *Conkright v. Frommert*, 130 S. Ct. 1640, 1651 (2010) (quoting *Firestone*, 489 U.S.
 21 at 111).

22 Accordingly, under these principles, the task of this Court is to determine whether
 23 Principal Life’s decision to terminate Plaintiff’s long term disability benefits was reasonable,

1 i.e. not illogical, implausible or without support.

2 **C. Principal Life's Determination Was Also Correct And Should Be Upheld**
 3 **Under The *De Novo* Standard Of Review.**

4 To the extent that this Court finds that a *de novo* standard of review applies here,
 5 Principal Life's claim review no longer is at issue but instead the Court must focus on the
 6 ultimate question: is plaintiff entitled to additional benefits under the Group Policy? As such,
 7 this Court is tasked with making an independent determination as to the claimant's entitlement
 8 to benefits under the Group Policy based on the evidence in the record before it without
 9 looking at Principal Life's review of the claim. *Compare Doe v. Prudential Ins. Co. of Am.*,
 10 CV 15-04089 AB (FFMx), 2017 U.S. Dist. LEXIS 45774 (C.D. Cal. March 27, 2017 (*citing*
 11 *Krolnik, supra*, ("de novo review' is a misleading phrase . . . For what *Firestone* requires is
 12 not 'review' of any kind; it is an independent decision rather than 'review' that *Firestone*
 13 contemplates . . . [The] court takes evidence (if there is a dispute about a material fact) and
 14 makes an independent decision about how the language of the contract applies to those
 facts.")).)

15 Based on Plaintiff's briefs, however, it appears that Plaintiff wants it both ways:
 16 having the Court make a determination under a *de novo* review without giving Principal Life's
 17 determination any deference and, at the same time, asking the Court to review Principal Life's
 18 assessment of Plaintiff's claim for procedural flaws and claims handling. Case law expressly
 19 excludes the second aspect from the court's determination of an ERISA disability case under a
 20 *de novo* review. *Diaz*, 499 F.3d at 640. The rationale for this rule is that, by reviewing the
 21 claim determination *de novo*, "[i]n effect, the plan administrator's decision has already been
 22 set aside under these circumstances, and the plan participant is provided with a fresh

1 opportunity to prove that she is entitled to benefits pursuant to the terms of the plan.” *Walsh v.*
 2 *Long Term Disability Coverage for All Emples. Located in United States of DeVry, Inc.*, 601
 3 F. Supp. 2d 1035, 1043 (N.D. Ill. 2009). Thus, in a *de novo* review, “the court must
 4 determine, based on all the evidence in the record, whether [a plaintiff] was qualified for LTD
 5 benefits under the terms of the Policy. . . . Consequently, under the *de novo* standard of
 6 review, ‘[w]hat happened before the Plan administrator or ERISA fiduciary is irrelevant.’”
 7 *Marantz v. Permanente Med. Group Inc. Long Term Disability Plan*, No. 06 C 3051, 2009
 8 U.S. Dist. LEXIS 118594, *22 (N.D. Ill. Dec. 21, 2009) (quoting *Diaz II*, 499 F.3d at 643).

9 Additionally, Principal Life’s structural conflict of interest as payor of benefits and
 10 adjudicator of claims plays no role whatsoever when the Court reviews the evidence before it
 11 to determine whether Plaintiff is entitled to additional benefits. For that reason, conflict of
 12 interest discovery is not allowed in cases subject to a *de novo* review. *See Rowell v. Aviza*
 13 *Tech. Health & Welfare Plan*, No.: C 10-5656 PSG, 2012 U.S. Dist. LEXIS 16957 (N.D. Ca.
 14 Feb. 10, 2012); *Daul v. PPM Energy, Inc.*, No. 08-CV-524-AC, 2010 U.S. Dist. LEXIS
 15 107630 (D. Ore. Oct. 6, 2010) (relying on *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955
 16 (9th Cir. 2006)); *see also Viera v. Life Ins. Co. of N. Am.*, 642 F.3d 407 (3d Cir. 2011)
 17 (“Because we have concluded that a *de novo* standard of review applies, we need not reach
 18 Plaintiff’s argument regarding LINA’s conflict of interest in being both the payor and
 19 administrator of benefits. That issue is only pertinent to an abuse-of-discretion standard of
 20 review.”); *Guy v. Sun Life Assur. Co.*, No. 10-CV-12150-DT, 2010 U.S. Dist. LEXIS 135615
 21 (E.D. Mich. Dec. 22, 2010) (“Here, there is no dispute that Defendant operated under a
 22 structural conflict of interest. However, that conflict of interest only becomes relevant as a
 factor to weigh in determining whether Defendant abused its discretion in denying Plaintiff’s

1 claim. If the standard of review is *de novo*, Defendant's decision-making, and its conflict of
2 interest, becomes irrelevant.")

3 As such, Plaintiff's arguments focusing on Principal Life's claim review (and whether
4 or not it was full and fair) as well as its determination and conflict of interest are improper for
5 a *de novo* standard of review and should be disregarded in their entirety to the extent the court
6 agrees with Plaintiff that a *de novo* standard of review applies in this case. The sole relevant
7 inquiry for this Court is whether the evidence establishes Plaintiff's continued benefit
8 eligibility under the terms of the Group Policy and within the confines of governing case law –
9 thereby keeping in mind that it is Plaintiff's burden to show, by a preponderance of the
10 evidence, that he is entitled to the benefits he seeks (*Principal Life does not have the burden
11 to prove that he is not entitled*).

12 **III. DISABILITY BENEFITS ARE NOT A HEDGE ON PLAINTIFF'S CHOICE OF 13 OCCUPATION**

14 Disability benefit plans provided by employers do not insure against a participant's
15 choice of an unpredictable, commission-based occupation. Principal Life provided Plaintiff
16 with an opportunity to obtain additional education and job retraining. Plaintiff elected to enter
17 an unpredictable, commission-based occupation when he became a realtor. Now, it seems,
18 Plaintiff wants to have his cake and eat it too. Despite the fact that Plaintiff maintains
19 functional capacity to perform a full range of sedentary, light, and medium strength level
20 occupations which would have a steady and stable salary, he has elected to pursue an
21 occupation with unpredictable earnings. Plaintiff expects Principal Life to continue paying
22 him disability benefits even though *he has the ability* to perform the material and substantial
23 duties of many different Gainful Occupations.

1 Such a result would be contrary to the clear terms of the Policy. Plaintiff's counsel
2 would have this Court ignore the fact that the Policy language requires only that:

3 After completing the Elimination Period and the Own Occupation Period, one of
4 the following applies:

- 5 a. The Member *cannot perform the majority of the Substantial and Material*
6 *Duties* of *any* Gainful Occupation for which he or she *is or may reasonably*
7 *become* qualified on education, training, or experience.
- 8 b. The Member is performing the Substantial and Material Duties of his or her Own
9 Occupation or any occupation on a Modified Basis and is unable to earn more
10 than 60% of his or her Indexed Predisability Earnings.

11 (AR 13) (emphasis supplied). The Policy defines Gainful Occupation as "employment in
12 which the Member could reasonably be expected to earn an amount equal to or greater than the
13 Primary Monthly Benefit." (AR 13). The Primary Monthly Benefit here is the same as the
14 Maximum Monthly Benefit or \$5,000 per month (\$60,000 per year).

15 **IV. PLAINTIFF MAINTAINS THE FUNCTIONAL CAPACITY AS WELL AS THE**
16 **KNOWLEDGE, SKILLS, AND ABILITIES TO PERFORM VARIOUS GAINFUL**
17 **OCCUPATIONS**

18 It is baffling that Plaintiff continues to argue that he cannot perform the material and
19 substantial duties of *any* occupation that would earn at least \$5,000 a month even though he
20 retains the functional capacity to perform occupations at the sedentary, light, and medium
21 exertion levels. Furthermore, Plaintiff ignores the *twenty years¹ he spent working in the*
22 *transportation and trucking industry*, which would almost certainly qualify him for a Gainful
23 Occupation in that industry that would fall within his physical restrictions and limitations,
24 perhaps the occupations of First-Line Supervisor of Transportation and Material Moving
Machine and Vehicle Operation or Transportation, Storage, and Distribution Manager as

¹ Plaintiff started working for McLane as a truck driver on April 18, 1988. (AR 2314). His last day worked was December 5, 2008. (AR 2354).

Principal Life identified. And, Plaintiff ignores his *now seven years² of experience working in the real estate industry*, which would almost certainly help to qualify him for the occupations of Real Estate Broker and Property, Real Estate, And Community Association Manager (if he is not already qualified for same.)

Furthermore, a side-by-side comparison of the Knowledge³, Skills⁴, and Abilities⁵ identified in O*Net as necessary to perform the identified occupations reveals that the same core competencies are necessary to perform all of the identified occupations. This renders Plaintiff's claim that he is unable to perform any Gainful occupation (besides Real Estate Sales Agent, of course) utterly preposterous when considering that Plaintiff has been making use of all of his knowledge, skills, and abilities to perform a Gainful Occupation now for *seven years*. A table attached hereto as **Exhibit A** shows that the Knowledge, Skills, and Abilities identified in O*Net for the identified occupations are the same. Logically then, it is impossible that Plaintiff can perform the material and substantial duties of a Real Estate Sales Agent but not of the other three identified occupations.

All identified occupations require customer and personal service, administration and management, clerical work, and use of computers and electronics. They all require active listening, coordination, critical thinking, judgment and decision making, time management, and complex problem solving. They all require oral comprehension, oral expression, written

² Five years of experience in the real estate industry as of the termination of disability benefits.

³ O*Net defines Knowledge as "organized sets of principles and facts applying in general domains. <https://www.onetcenter.org/content.html>

⁴ O*Net defines Basic Skills as "developed capacities that facilitate learning or the more rapid acquisition of knowledge"; O*Net defines Cross-Functional Skills as "developed capacities that facilitate performance of activities that occur across jobs. <https://www.onetcenter.org/content.html>

⁵ O*Net defines Abilities as "enduring attributes of the individual that influence performance." <https://www.onetcenter.org/content.html>

1 comprehension, deductive reasoning, problem sensitivity, inductive reasoning, and information
2 ordering. It defies logic that Plaintiff has been employing all of the above enumerated
3 knowledge, skills, and abilities in his real estate practice, but would be unable to apply them to
4 any other Gainful Occupation. Plaintiff's argument to that effect is absurd.

5 Equally absurd is the argument that Plaintiff does not have the requisite knowledge and
6 experience to transition to either of the identified Gainful Occupations in the transportation
7 industry: First-Line Supervisor of Transportation and Material Moving Machine and Vehicle
8 Operation and Transportation, Storage, and Distribution Manager. Plaintiff worked in the
9 transportation and trucking industry for *twenty years* before the onset of his disability. He now
10 argues that, despite those twenty years of experience in the field, he does not have the training
11 and experience to transition to a Gainful Occupation in that industry.

12 As Principal Life has argued in its opening brief and responsive brief, and as the
13 evidence makes clear, Plaintiff has the functional physical capacity to perform occupations at
14 the sedentary, light, and medium exertion levels. The only question is whether Plaintiff lacks
15 the *ability* to perform any Gainful Occupation. Principal Life has identified several Gainful
16 Occupations within Plaintiff's restrictions and limitations. Furthermore, those occupations
17 require very similar knowledge, skills, and abilities to the Gainful Occupation Plaintiff *has*
18 *been performing* since 2010. **Exhibit A** provides a graphic representation of the similarities in
19 the requirements between the identified Gainful Occupations. To the extent that Plaintiff has,
20 in fact, been performing the occupation of Real Estate Sales Agent for the past seven years,
21 any argument he makes that he lacks the core competencies to perform the other Gainful
22 Occupations should be disregarded as contrary to the evidence.

V. OCCUPATIONAL TITLES ARE IRRELEVANT WHERE THE DATA SUPPORTS THAT THE OCCUPATIONS ARE GAINFUL UNDER THE GROUP POLICY TERMS

The data speaks for itself. The identified occupations are Gainful within the terms of the Group Policy. Plaintiff's arguments with regard to the titles of the occupations, specifically the Washington State's definition of Real Estate Broker, are nothing more than a smoke screen. No matter what the titles of the occupations are, they clearly satisfy the Group Policy definition of Gainful Occupation based on the United States Bureau of Labor Statistics.

OCCUPATION	ANNUAL MEAN WAGE IN SEATTLE/TACOMA/BELLEVUE, WASHINGTON AREA	GAINFUL OCCUPATION? (> \$60,000/year)
First-Line Supervisor of Transportation and Material Moving Machine and Vehicle Operator	\$69,810.00	Yes
Transportation, Storage, and Distribution Manager	\$101,170.00	Yes
Real Estate Broker	\$86,410.00	Yes
Property, Real Estate, and Community Association Manager	\$79,740.00	Yes

Principal Life has provided ample data to support its conclusion that there are numerous Gainful Occupations that Plaintiff either is or may reasonably become qualified based on education, training, or experience. Plaintiff's arguments as to the titles of those occupations cannot overcome the data.

VI. CONCLUSION

For all of the reasons discussed above, Principal Life respectfully requests that the Court grant Principal Life's Motion for Judgment, affirming its determination to terminate Plaintiff's disability benefits and entering judgment in Principal Life's favor while denying Plaintiff's cross-motion.

1 DATED this 31st day of July, 2017

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12 **Attorneys for Defendant Principal Life**
13 **Insurance Company**

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

Dated this 31st day of July, 2017

/s/ Edna S. Kersting

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